IN THE

SUPREME COURT

OF THE

UNITED STATES.

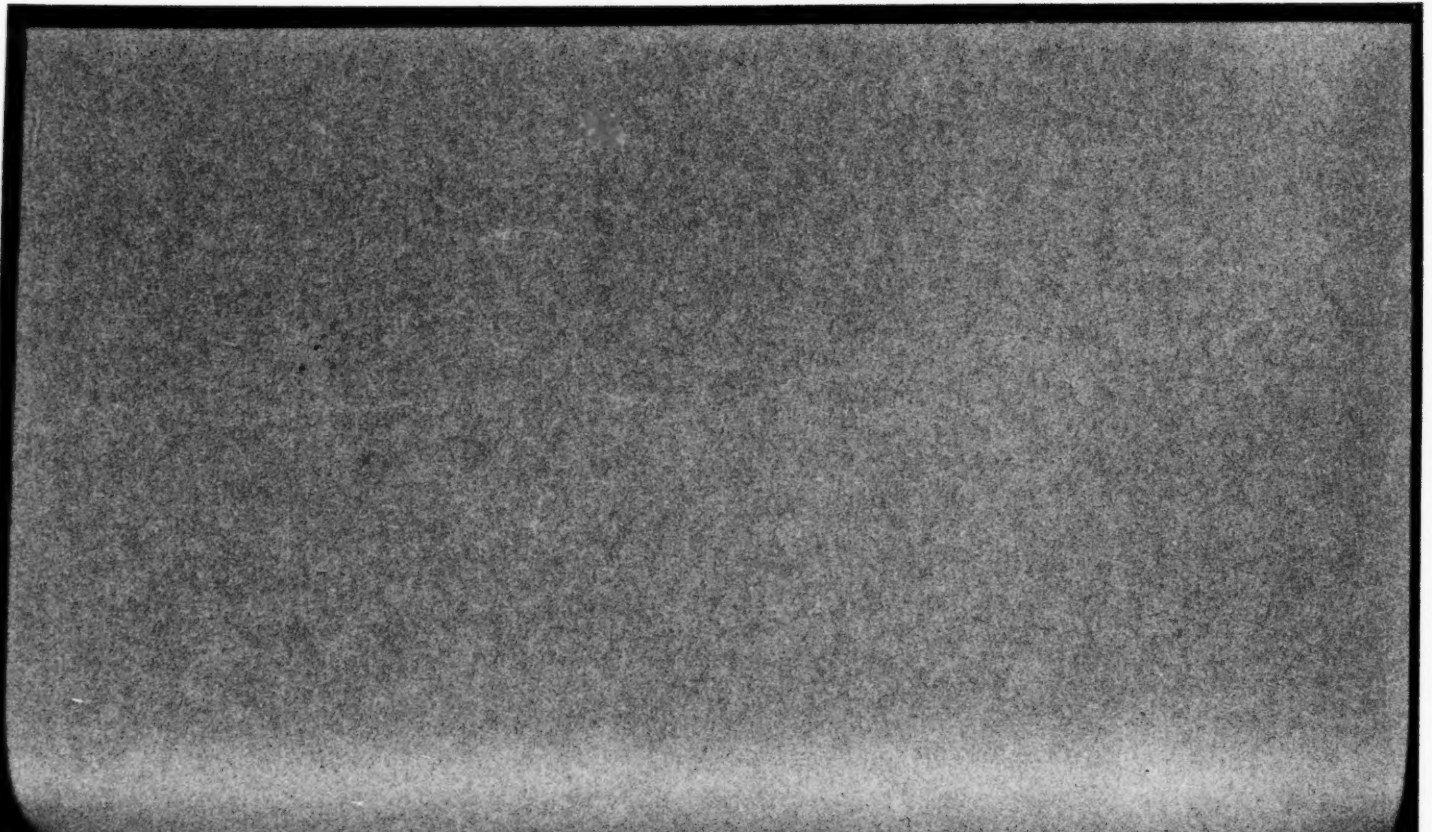
October Term, 1925.

No. 146.

Mrs. Charles E. Wells, Administratrix of the Estate of Charles E. Wells,
Appellant,
vs.
Francis E. Bodine and Arabella Bodine,
Appellees.

BRIEF OF APPELLANT.

Mrs. Charles E. Wells, in Pro. Per.



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Appellant,

vs.

Patrick H. Bodkin and Arabella Bodkin,
Appellees.

BRIEF OF APPELLANT.

Statement of the Case.

This is a suit in equity to have the patentees of certain lands declared trustees for the plaintiff. The facts stated chronologically are as follows:

May 18, 1903, one Geiger made homestead entry of the land in controversy.

September 8, 1903, the land was withdrawn from public entry by the Secretary of the Interior under the Reclamation Act (32 Stat. 388), said withdrawal being what is known as a "first form" withdrawal.

June 6, 1905, the Secretary of the Interior promulgated a regulation purporting to provide for contest pending the withdrawal of entries made prior to the withdrawal (33 L. D. 607), a peculiar provision of the right attempted to be provided thereby being that its *initiation* was to be considered as "suspended" until such unknown future time as the withdrawal might, perchance, be vacated.

On January 30, 1908, one Florence Bodkin, daughter of appellees, filed application to contest the Geiger entry, and on March 13, 1908, Geiger relinquished his entry, no trial of the contest being had.

On July 1, 1908, the register of the local land office notified Florence Bodkin that as a consequence of her application to contest and the relinquishment of the Geiger entry she had been awarded a preferred right of making entry to the land in question according to the terms of the aforesaid regulation, at any time within thirty days after the first form withdrawal might be vacated, date of such vacation being unstated.

On or about August 1, 1908, appellant purchased a township plat from the register of the local land office on the margin of which was printed: "The purchaser of this plat is entitled to definite information of what is vacant government land," said plat showing the quarter section previously entered by Geiger to be vacant and unclaimed.

On April 18, 1910, the withdrawal was, by order of the Secretary of the Interior, vacated to the extent that settlement rights were proclaimed to be attachable under the land laws, and appellant thereupon settled upon said quarter section in ignorance of the legal claims of any other person.

On May 18, 1910, the withdrawal was completely vacated and the land made subject to the full operation of the general land laws, and accordingly on that date appellant made homestead application for the land in question, said application being based on said settlement.

On the same date Florence Bodkin tendered application to make homestead entry to the same land, basing her application on her alleged preferred right claimed to have been acquired.

March 25, 1912, Florence Bodkin died, but notwithstanding, on June 3, 1912, the local land office rejected the application of appellant for alleged conflict with the alleged preferred right

of Bodkin, and accepted the entry of Florence Bodkin, and on appeal the Commissioner of the General Land Office made the same error.

May 27, 1913, on appeal to the Secretary of the Interior, the previous decisions were reversed on the ground that there was no authority in law for the allowance of an entry in the name of a deceased person. The entry of Bodkin was accordingly cancelled and the entry of appellant, filed as aforesaid, May 18, 1910, was accepted.

August 29, 1913, appellees applied for a rehearing of said appeal, and in said rehearing the claims of appellants was again denied.

Thereafter appellees applied for the exercise of the supervisory authority of the Secretary, still contending, only, for the right to perfect both homestead claims at the same time, and on January 3, 1914, some assistant secretary rendered decision therein, again denying the contention, but suggested a relief not petitioned for to the effect that "if" Florence Bodkin had been prevented by intimidation from residing upon the land applied for, and her heirs then wished to perfect her application and Patrick H. Bodkin would relinquish the homestead entry held in his own right, the entry of appellant would be cancelled to permit the entry of the appellees.

Thereafter, on March 6, 1914, Patrick H. Bodkin relinquished the homestead entry held in his own right, and at the same time tendered homestead application for the land then covered by the entry of appellant.

May 2, 1914, without a hearing on the charge of intimidation and without evidence, the Commissioner of the General Land Office, as directed by the letter of the said assistant secretary, cancelled the entry of appellant and closed the case.

September 22, 1914, appellant filed application to contest the entry of Patrick H. Bodkin, allowed as one of the heirs of Florence Bodkin, alleging that the same had been secured through fraud and perjury in making the charge of intimidation, but the local land office rejected said application on the ground that it did not state facts sufficient for a cause of action. Appellant appealed this rejection to the Commissioner of the General Land Office, and said appeal is still pending and undecided.

In his answer to the complaint of appellant in the United States District Court appellees reiterated at length the charges of intimidation, but at the trial, as in the Land Department, no evidence of intimidation was offered.

Thereafter, on or about September 15, 1914, exhibiting his entry allowed as heir to Florence Bodkin, Patrick H. Bodkin obtained a writ of

ejectment from the Superior Court of the county, directed against appellant, as a consequence of which and of the action of the Land Department, appellant lost possession of the land entered and was prevented from making final proof of compliance with the homestead law.

Argument.

In the judgments of the court below there were two major and fundamental errors, viz.: (1) Error in assuming that Florence Bodkin, under the circumstances of this case, acquired any preferential right to enter the land in controversy, and (2) even assuming that such right was acquired, error in holding that appellees had not lost, forfeited or abandoned all right to succeed under such as the heirs of Florence Bodkin, or to displace the entry of appellant.

Discussing this last mentioned error, it must be evident that the right of an heir could be no greater than that of the person inheriting under, and as Florence Bodkin, conceding her a perfectly legal and valid right of entry to a certain tract, would certainly have lost that right by making entry of some other tract and claiming same until entry of the original tract by another, just so must appellees be held to have abandoned all right to succeed under the claim of Florence Bodkin.

By the same law under which it is claimed Florence Bodkin acquired a preferred right by contest, a settler is given a preferred right of just three times the power, and yet in Cawood v. Dumas, 22 L. D. 585, the Land Department decided:

> "The right to change entry from one tract to another can not be allowed in the presence of an intervening adverse right, even though the applicant may have been the prior settler on the tract thus applied for."

To the same effect is Cowen v. Asher, 6 L. D. 785; Noyes v. Beebe, 16 L. D. 313, and many others.

The entry of appellant was allowed in accordance with department rulings made with full knowledge of all the circumstances; if appellees wanted to change their entry at that time they made no mention of it.

> "An entry should not be cancelled where it was allowed in accordance with departmental rulings then in force, and the entryman relying thereon has proceeded in compliance with the law."
>
> Allen v. Cooley, 2 L. D. 261;
>
> Oliver v. Thomas, 5 L. D. 292.

The department at all times held against the contention of appellants because their claim could only be allowed by their maintaining at

the same time two residences. It was due to the suggestion of the department, and not to appellees, that a cure of such illegal claim involving the cancellation of appellants' entry was arranged.

> "A person can not maintain two residences at one and the same time, and two tracts being thus attempted to be held illegally, such illegality may not be cured after completion of proof on one tract, where an intervening right has attached to the other."
>
> Robinson v. Packard, 6 L. D. 225.

Might it not be that the reason appellees finally consented—under the friendly suggestion of the department—to relinquish entry to the other land claimed in order to legally claim the land covered by the entry of appellant was because appellant had, under his entry and in good faith, so improved the land that it had become more desirable to appellees than the land they then resided upon? All the circumstances go to indicate such to be the real reason, and the possibility of it under a government of law is intolerable. Are there no limits of time or of circumstance to the peculiar claim of right here attributed to the appellees?

But appellant is convinced that Florence Bodkin never at any time had any right that was founded on law. If he had thought otherwise he would not have offered his homestead appli-

cation on this land. It has always been and always will be that wherever there is reason to deny an entry of land there is the same reason to deny the *right* of entry. At the time Bodkin filed contest the land was withdrawn from entry. It was stated by the department to have been withdrawn "from all forms of disposition" and "withdrawn from the operation of the land laws." It was certainly so withdrawn. The law authorizing such withdrawal was mandatory, and applied to all land where certain conditions were found to exist. By making withdrawal the Secretary of the Interior certified to the existence of such conditions. When he found such conditions no longer existed, he was commanded to restore the land to entry—to vacate the withdrawal. But while, by continuing the withdrawal, he certified to the continued existence of the conditions requiring the same, the secretary had no authority but to maintain the status of complete withdrawal. There was no middle ground authorized, and concerning the law of contest, which has been much cited by counsel for appellees and by the courts in this and other cases, that law, as was all other land laws, was as completely removed from application to this land under withdrawal as if no such laws had ever been made, and they therefore furnished no grounds for declaring what right of entry Florence Bodkin here had. The right

claimed for her depended solely upon the regulation promulgated by the Secretary of the Interior on June 6, 1905, and on nothing else (33 L. D. 607).

Such regulations were not necessary to carry any purpose of the Reclamation Act into force and effect, they were in fact contrary to the mandate to "withdraw" the land, and the subterfuge provided of considering the preferred right resulting to be a right *initiating* only at such unknown future time as the withdrawal might perhaps be vacated, was a subterfuge permitting a preferred class of claimants to *evade* every intent and purpose of the withdrawal. It was unconstitutional because it set up a discrimination not possible to be overcome by those not in the preferred class.

It was proven in the case of Edwards v. Bodkin, 249 Fed. 562 (sustained by this court), that the withdrawal interfered with proceedings of entrymen who had made entry before withdrawal, such entrymen could not possibly contest themselves, or get a preferred right to make a second entry "at any time within thirty days after notice" that the land had been released from withdrawal. It amounted to a scheme to forcibly foreclose the rights of an entryman under conditions changed after entry, in favor of a new claimant coming on the scene in full

view of the changed conditions, and proposed to hold the "right" of such new claimant indefinitely, time without limit, while time increased the value of his absentee holding of right.

Counsel for appellees were successful in inducing the lower courts to believe that this court had, in the case of McLaren v. Fleischer, 253 U. S. 479, sustained the legality of such a contest as this, and of the resultant preferred right. But however similar the facts may have been in that case to the case here, the questions raised were quite the opposite. There the application of the contest law was conceded, here the application of that law is expressly denied and error assigned to its previous consideration. There the only question raised was that of the remarkable and unlimited extension attempted to be provided the right resultant. Here appellant calls attention to the fact that before extension was attempted to be provided, the regulations *first* provided for the proceedings depended on to initiate that right, recognizing thereby that the contest law, insofar as this land was concerned, had ceased to exist. The regulations, therefore, first provided the proceeding of contest, specified the grounds of contest and specified every single thing that a contest law might require, leaving nothing to be measured by the contest law provided by Congress on May

14, 1880, except as a reference for counsel for these preference rights claimants to camouflage the fiction that their claims were founded on law. The

(NOTE: The above copy was prepared by Charles E. Wells before his death; it shows to be unfinished, but the heirs know of no one competent to finish it. They therefore leave the case in the hands of the court thus unfinished.)

(Signed) (MRS.) CHARLES E. WELLS,
Administratrix.

(23)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 144.

SUSIE WELLS, ADMINISTRATRIX OF THE ESTATE OF CHARLES E. WELLS, APPELLANT,

vs.

PATRICK H. BODKIN AND ARABELLA BODKIN.

AMENDED BRIEF FOR APPELLANT.

Appellant hereby amends her brief filed in the above-entitled action in the following particulars:

I.

Appellant hereby alleges that through an error the above entitled action has been filed in the name of Mrs. Charles E. Wells, administratrix of the estate of Charles E. Wells. That in truth, and as a matter of fact, the said Mrs. Charles E. Wells was appointed administratrix of the estate of Charles E. Wells in the Superior Court of the County of Riverside,

State of California, under the name of Susie Wells, and appellant therefore requests that the above-entitled action appear as follows, to-wit:

SUSIE WELLS, *Administratrix of the Estate of Charles E. Wells, Appellant,*

vs.

PATRICK H. BODKIN and ARABELLA BODKIN, *Appellees.*

II.

That the appellant through an error and oversight omitted a portion of her statement of the case immediately following the sentence ending at line 25, page 5 of appellant's brief filed in this action and therefore amends her brief at line 25, page 5, by adding the following words, to-wit: "On May 18, 1910, Patrick H. Bodkin filed homestead in his own name."

SUSIE WELLS,
Administratrix;
Also known as (Mrs.) Charles E. Wells, Administratrix.